No. 88-261

In The

Supreme Court of the United States

October Term, 1988

MARILYN ARONS,
Petitioner,

v.

NEW JERSEY BOARD OF EDUCATION, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. The most remarkable feature of respondents' brief in opposition ("Opp. Br.") is what it does not say. Thus, nowhere in respondents' lengthy opposition do they ever take issue with the principal argument made by petitioner: namely, that the ruling below threatens the fulfillment of the goals Congress set forth in the Education for All Handicapped Children Act ("EAHCA" or "Act") because it may well eliminate the availability of nonlawyer experts to advocate on behalf of children and parents in hearings held under the Act. Indeed, respondents only add fuel to petitioner's fears about the likely exclusion of lay advocates from EAHCA hearings, since respondents go out of their way to emphasize that the Third Circuit's ruling may require the Supreme Court of New Jersey to reconsider whether to allow lay advocates to play any representational role in EAHCA hearings. Opp. Br. at 6 n.*.

2. Nor do respondents forthrightly deal with petitioner's contention that the inevitable result of the ruling below — that

parents will be forced to either handle these hearings alone, or, for more affluent parents, incur the substantial expense of hiring an attorney — runs directly counter to Congress' clearly expressed intent in the Act. Respondents do not dispute that Congress sought to ensure that the dispute-resolution mechanism established by the Act, which plays a pivotal role in ensuring that the rights conferred by the Act are enforced, would be accessible to all parents, and would not pose the burdens and expenses ordinarily associated with litigation. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 9 (1975). Rather, respondents suggest that the elimination of the availability of lay advocates would not hamper parents' ability to secure representation, since there are free legal services available and a large pool of lawyers with expertise in EAHCA hearings. Opp. Br. at 15 n.*.

In fact, the statistics in the record paint precisely the opposite picture. During the four year period covered by the statistics that respondents submitted in the district court, Ms. Arons handled 65 cases, which was twenty percent of all of the EAHCA cases before the State Office of Administrative Law during that time. In contrast, the only two sources of free legal services available in New Jersey — the Public Advocate's Office and the Community Health Law Project — handled 31 and 6 cases, respectively, or a total of less than ten cases a year for the entire State. Affidavit of Richard I. Parker, ¶¶ 5-10.

With regard to the availability of private counsel, the State's claim that two hundred practitioners have handled these cases (Opp. Br. at 15 n.*) is wholly disingenuous. Virtually all of these lawyers represent school boards — not parents. Indeed, according to respondents' statistics, only four attorneys in the State handled EAHCA hearings on behalf of parents during the four years studied, and none of these lawyers handled

anywhere near the number of cases that Ms. Arons did. Affidavit of Richard I. Parker, ¶¶ 5, 6, 7, 10. Thus, contrary to respondents' claim, the elimination of lay advocates will indeed force most parents either to handle the hearing alone or to bear the expense of hiring an attorney. That result cannot be reconciled with Congress' intent in the Act.

3. Instead of addressing petitioner's main arguments, respondents' opposition is devoted principally to pointing out that the EAHCA operates as a federal grant program, and, for that reason, courts should be wary about imposing a duty on participating states unless the duty has been "unambiguously" imposed by statute or regulation. Opp. Br. at 11-13, *citing Pennhurst State School and Hospital v. Haldeman*, 451 U.S. 1, 17 (1981). Thus, respondents argue, because Congress did not expressly state that lay advocates may represent parents in EAHCA, that is the end of the Court's inquiry.

No case cited by respondents, including *Pennhurst*, has insisted on the level of detail that is comparable to the Tax Code or a criminal statute on matters such as this, as respondents apparently contend. To the contrary, as *Pennhurst* and innumerable other cases make clear, the question is whether Congress has spoken with "a clear voice," and, in exploring that question, courts are free to, and in many cases must, look behind the language of the statute to ascertain Congress' intent. *Pennhurst, supra*, 451 U.S. at 17; *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 669-70 (1985). Here, as petitioner demonstrated in her petition, and as New Jersey itself acknowledged when it permitted lay advocates to represent parents in EAHCA hearings because such representation is "required by federal statute," there can be no doubt that Congress intended that lay advocates be allowed to handle EAHCA proceedings. *See* N.J. Ct. R. 1:21-1(e), *reprinted in* Opp. Br. at 3 n.*; N.J.A.C. 1:6A-4.2(b), *reprinted in* Opp.

Br. at 5 n.*. Moreover, not only is the Third Circuit's ruling inconsistent with the State's longstanding construction of the Act as *requiring* it to allow lay advocates to represent parties in EAHCA proceedings, but it will also come as a surprise to the Department of Education, which has long recognized that "legal or [lay] advocate representation is essential for both sides" in EAHCA hearings and that in many states lay advocates provide a substantial portion of such representation. U.S. Department of Education, *Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act*, 77 (1987).

Indeed, under the construction given by the Third Circuit, and now embraced by respondents, the key language in section 1415(d) is pure surplusage. Thus, although section 1415(d)(1) provides that parties to EAHCA have "the right to be accompanied or advised by individuals with special knowledge or training with respect to the problems of handicapped children," the court below held that it merely authorizes parents to have an experts attend hearings and render off-the-record advice — rights that plainly exist even in the absence of the statute. As a result, the interpretation developed below, which was urged by neither party, robs the operative language of section 1415(d) of any meaning, and hence review by this Court is required.

CONCLUSION

For the reasons stated above, and in the petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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